

CONTINUING RESIDENCY REQUIREMENTS: QUESTIONING BURDENS ON PUBLIC EMPLOYMENT IN NEW JERSEY

*Jason Rindosh**

I. INTRODUCTION

It is amazing how the English language contains some words so inherently ambiguous that they can only be properly defined by contextual examples. “Liberty,” a treasured term used in both the Federal Constitution and state constitutions in the United States,¹ is perhaps one term that can only be superficially understood until placed in context. The meaning of such an open term, capable of expansive or narrow interpretation, would have only semantic value if it were not for the legal protections that the Federal Constitution and other state constitutions afford against deprivations of liberty.² The interpretive meaning ascribed to the term liberty is thus more than for sake of clarification or philosophical exercise, it is the constitutional rule.

This Comment addresses a narrow issue that implicates both federal and state constitutional concerns involving the scope of the word liberty. It specifically proffers that the term liberty ought to imbue every publicly employed individual with a constitutionally protected fundamental right to choose where to make his abode, spend his free time, and raise his family, without the threat of being discharged or foreclosed of opportunities from public employ. The only necessary exception to this rule should render unprotected those private decisions that impede the employee from fulfilling the duties of his or her position. The heart of the issue can be framed generally as “whether the government may compel an individual to

* J.D. Candidate, May 2012, Seton Hall University School of Law; B.A., 2005, Rowan University. Thank you Professor Robert Martin for your helpful assistance and guidance and my father and mother for all they have ever done.

¹ See, e.g., U.S. CONST. pmb. (The purpose of the Constitution was partly “to form a more perfect Union . . . and secure the Blessings of Liberty.”); N.J. CONST. art. I, § 1 (All people have an inalienable right “of enjoying and defending life and liberty.”); N.C. CONST. art. I, § 1 (It is “self-evident that all persons . . . are endowed . . . with certain inalienable rights . . . among these . . . liberty.”).

² See U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

live within its boundaries as a condition of continued employment.”³

For clarity, it is important to distinguish among the various types of residency requirements at the outset. Continuing residency requirements must first be distinguished from durational residency requirements both in terms of the definition and the constitutional analysis that the majority of courts apply.⁴ Durational residency requirements apportion benefits or impose hardships differently among residents that have lived in a jurisdiction for some defined period of time and those that have recently moved within the jurisdictional scope of the applicable law.⁵ In *Shapiro v. Thompson*, the U.S. Supreme Court determined that a durational residency requirement imposing a one-year waiting period prior to the receipt of welfare benefits impinged on “the fundamental right of interstate movement” and applied an intermediate level of constitutional scrutiny requiring that the law further a compelling state interest.⁶

Contrary to the durational variety, continuing residency requirements, of the variety pertaining to employment, require residency within an identifiable geographically defined area, whether a city, county, or state, as a condition precedent to the receipt and continuation of employment.⁷ These requirements apply only to those individuals who are publicly employed, and approximately twenty-four percent of cities within the United States currently force a public employee to live within city limits as part of a continuing residency requirement.⁸ Residency requirements can and have been enacted through various legislative means, including state statute, municipal ordinance,⁹ or municipal charter.¹⁰

³ See *Abrahams v. Civil Serv. Comm’n*, 319 A.2d 483, 501 (N.J. 1974) (Pashman, J., dissenting).

⁴ See *Ector v. City of Torrance*, 514 P.2d 433, 437 (Cal. 1973) (noting that continuing residency requirements utilize residency as a condition precedent to the receipt of a benefit whereas durational requirements have this requirement in addition to a waiting period necessary to the receipt of the benefit).

⁵ See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (providing a description of the functioning of durational residency requirements in the form of a waiting-period for the receipt of welfare benefits for newly arrived residents).

⁶ *Id.* at 638.

⁷ See, e.g., *Kennedy v. City of Newark*, 148 A.2d 473, 475 (N.J. 1959) (reviewing an ordinance for the city of Newark that required “all of its officers and employees to reside in the city as a condition for continued employment”). Sometimes these requirements will allow a newly hired employee a graced period during which he or she is required to comply with the requirement. See discussion *infra* Part II.B.1.

⁸ See Brian Duncan, *Using Municipal Residency Requirements to Disguise Public Policy*, 33 PUB. FIN. REV. 84, 84 (2005).

⁹ See, e.g., CINCINNATI, OHIO, MUN. CODE ch. 308, §§ 83(a)–(b) (2010) (requiring

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Regardless of the precise legislative means utilized to enact the requirement, continuing residency requirements can be further bifurcated into two variations. The first variation, the targeted residency requirement, imputes the requirement on a class of employees for a specific purpose stemming from the unique duties and obligations required by the employment position.¹¹ For example, police officers, as a class, may be required to live in a city in light of a public policy determination that they are implicitly obligated to remain actively protective of the community during off-duty hours.¹² A “comprehensive residency law,” by contrast, “requires all municipal employees hired after the law is enacted to live in the city.”¹³ Comprehensive and targeted residency laws can be more expansive than a limitation of residency to a city, however, such as requiring residency in a state or county for all employees as a condition of employment.¹⁴ The geographic area delineated by the requirement naturally corresponds to one aspect relevant to determining the scope of the burden.¹⁵ In terms of constitutional treatment, the U.S. Supreme Court has applied a rational basis level of scrutiny in upholding targeted residency requirements for police officers against challenges levied under the Equal Protection Clause.¹⁶ The U.S. Supreme Court has further rejected the argument that a residency

any employee of the city to reside in the state of Ohio; requiring firefighters and police to live within the city or an adjacent county to fulfill duties in the event of an emergency; and further requiring “senior executive officers” to reside within the city because necessary to fulfill obligations owed to the city).

¹⁰ See, e.g., CLEVELAND, OHIO, CITY CHARTER ch. 11, § 74(a) (1982) (providing that all employees of the city must live within its geographic boundaries).

¹¹ Duncan, *supra* note 8, at 87.

¹² See *Detroit Police Officers Ass’n v. City of Detroit*, 190 N.W.2d 97, 98 (Mich. 1971), *appeal dismissed*, 405 U.S. 950 (1972) (noting the fact that Detroit police officers were required to carry weapons at all times, including off duty hours, which evidenced a specific need for police officers to be present and active in the community during their off-duty hours). This point will be further explicated as part of an argument that the obligations and duties of being a police officer are easily differentiated from other classes of public employees. See *infra* Part III.B.4.

¹³ Duncan, *supra* note 8, at 87.

¹⁴ See CINCINNATI, OHIO, MUN. CODE ch. 308, § 83(a) (requiring all employees of the city to reside in the state of Ohio).

¹⁵ Aside from the geographic area, the scope of applicable persons is determined by what classes of employees are covered. Naturally, comprehensive residence requirements are the most onerous in this respect as they affect every class of employee.

¹⁶ See *Detroit Police Officers Ass’n*, 405 U.S. 950 (implying that rational basis review was appropriate as utilized by the Michigan Supreme Court for residency requirements of police officers).

requirement targeting firefighters infringes upon a fundamental right to travel protected by the Privileges and Immunities Clause.¹⁷ Both cases that the U.S. Supreme Court reviewed pertained to targeted, rather than comprehensive, residency requirements. These targeted residency requirements can be further narrowed to classes of employees obligated to perform public safety functions.

The propriety of residency requirements has also been considered at the state level.¹⁸ After the financial meltdown of 2008, the New Jersey legislature proposed various comprehensive residency requirements effectively requiring any public employee working in New Jersey to live in the state as a condition of employment.¹⁹ The original proposal sought to amend the existing statute, N.J.S.A. § 52:14-7,²⁰ to require that any person employed or holding a position in the state of New Jersey make his or her principal residency in the state.²¹ Principal residency is defined in the bill as the place “where the person spends the majority of his or her nonworking time, and . . . which is most clearly the center of his or her domestic life, and . . . which is designated as his or her legal address and legal residence for voting.”²² The bill, as first introduced, also provided that anyone obtaining employment or a position within the state would be temporarily exempt from the requirement for one year or for a period of four months from the point of assuming an office or position.²³ Persons already employed by the state in violation of the requirement would also have a grace period of two years and six

¹⁷ *McCarthy v. Phila. Civil Serv. Comm’n*, 424 U.S. 645, 646–47 (1976) (per curiam) (holding that a similar requirement for a firefighter of the city of Philadelphia does not violate the interstate right to travel under *Shapiro’s* precedent).

¹⁸ *See, e.g.*, Assemb., A2515, 213th Leg., (N.J. 2008).

¹⁹ *Id.* Introduced on March 8th, this bill was comprehensive and contained exemptions for persons with specialized skill and a period of deferral for financial hardship. *Id.* This bill was later combined with A3808 and adopted in a substantially less comprehensive form on January 4th, 2010. *See* Assemb., A2515/A3808, 213th Leg. (N.J. 2010).

²⁰ S. S1730, 214th Leg. (N.J. 2010).

²¹ *Id.* The scope of the original bill covered virtually every employee as it applied to any person holding an office or position in any branch of the State government, or “with an authority, board, body, agency, commission . . . or instrumentality of the State including any State college, university or other educational institution, or . . . with a county, municipality, or other political subdivision of the State or an authority, board, body, agency, district, commission, or instrumentality of the county, municipality, or subdivision.” *Id.*

²² *Id.*

²³ *Id.*

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months to comply with the requirement under the original bill.²⁴ Finally, the bill provided that any person violating the requirement for a 365-day period would be subject to judicial ouster if “any officer or citizen of the state” brings an action within a year of the violation.²⁵

On May 13, 2010, the New Jersey Senate approved the “New Jersey First Act” proposal that Senators Norcross and O’Toole²⁶ first initiated.²⁷ The Senate Committee substitute that was approved on May 13, 2010 included some substantial changes to the structure of the original bill.²⁸ Important changes included an exemption for all persons currently holding public employment positions so long as they did not “voluntarily” change their “employment, office, or position.”²⁹ Further, the bill was altered to include a separate exemption for “any person . . . employed on a temporary or per-semester basis as a visiting professor, teacher, lecturer, or researcher by any State college, university, other educational institution” and for persons with job duties that require them to spend the majority of their working time outside of the state.³⁰ The final variations adopted in the Senate Committee substitute also sought to create a three-member panel “composed of a person appointed by the Governor, a person appointed by the Speaker of the General Assembly, and a person appointed by the President of the Senate” to consider applications for residency exemptions.³¹ Though later abandoned, the Senate’s initial contemplations regarding the types of exemptions granted seemed to portend that they would be limited to individuals working at universities who “hold a position requiring special

²⁴ *Id.*

²⁵ *Id.*

²⁶ S. S1730, 214th Leg., S. Comm. Substitute (N.J. 2010).

²⁷ S. S1730, 214th Leg., (N.J. 2010). Senators Norcross and O’Toole initially made the proposal on March 11, 2009.

²⁸ S. S1730, 214th Leg., S. Comm. Substitute (N.J. 2010). An identical bill was introduced to the New Jersey Assembly on March 8, 2010. *See* Assemb., A2478, 214th Leg., (N.J. 2010).

²⁹ S. S1730, 214th Leg., S. Comm. Substitute (N.J. 2010). An example of an involuntary change in position would be forced reassignment. *Id.* Most residency requirements, assuming they have not been on the books for some extended period of time, offer an amnesty for individuals living outside the required area holding employment positions prior to enactment. *See* *Lorenz v. Logue*, 611 F.2d 421, 423 (2d Cir. 1979) (acknowledging Judge Burns’s observation that a clause exempting employees hired prior to the residency requirement while imposing the requirement on newly hired employees was “the least disruptive and most humane method” to implement a residency requirement).

³⁰ S. S1730, 214th Leg., S. Comm. Substitute (N.J. 2010).

³¹ *Id.*

expertise or extraordinary qualifications in a scientific or technical area.”³² The Senate Committee substitute required that the three-member committee give applications from persons with such expertise or extraordinary qualifications “particular attention” and consider how denying the individual an exemption would be injurious to New Jersey’s ability to “compete successfully” with scientific and technical colleges and schools of other states.³³

After the New Jersey State Assembly approved the bill, Governor Chris Christie commended “the sponsors for their efforts to increase employment opportunities for New Jersey residents” in his conditional veto.³⁴ The conditional veto was limited to a concern that the three-member panel reviewing hardship applications needed to be revamped to establish an “appropriate review process” capable of dealing with the expected volume of applications.³⁵ The New Jersey Senate was in its second reading and, likely considering the concerns of Governor Christie’s conditional veto, made some final changes to the bill.³⁶ The New Jersey First Act was approved on March 17, 2011, and became effective starting September 1, 2011.³⁷

The enacted New Jersey First Act retained much of the substance of the Senate Committee substitute.³⁸ The Act maintained the same definition of “principal residence” and the comprehensive application to any person “holding office, employment, or position” in the State of New Jersey.³⁹ The exemption for certain employees at institutions of higher education, as well as the exemption for persons spending the majority of their working hours outside of the State, were also incorporated in the final bill.⁴⁰ Perhaps to facilitate an efficient review of the higher education exemption, the bill requires that each university or institution provide a report enumerating the full- and part-time positions exempt and the reasons for the claimed

³² *Id.*

³³ *Id.* Some classes of employees and positions, specifically the head of a principle department of the executive branch and any judge of the State Supreme Court, Superior Court, or any other lower court created by the laws of the state, are categorically barred from applying for the exemption. *Id.*

³⁴ S. S1730, 214th Conditional Veto (N.J. 2011).

³⁵ *Id.*

³⁶ N.J. STAT. ANN. § 52:14-7 (West 2010)

³⁷ *Id.*

³⁸ Compare S. S1730, 214th Leg., S. Comm. Substitute (N.J. 2010), with N.J. STAT. ANN. § 52:14-7 (West 2010).

³⁹ N.J. STAT. ANN. § 52:14-7 (West 2010).

⁴⁰ *Id.*

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exemption.⁴¹ By reviewing the exemptions by position instead of on an individual basis, the reviewing panel should be able to more efficiently review applications as was of concern for Governor Christie.

The most monumental decisions made with respect to the New Jersey First Act were twofold. First, the final bill included a grandfather clause.⁴² Under the grandfather clause, any person holding office, employment, or a position with the state and having a principal residence outside the state will not be affected by the residency requirement so long as that individual is “without a break in public service of greater than seven days.”⁴³ Second, the New Jersey First Act enlarged the committee to review applications from three members to five and empowered it to grant exemptions “on the basis of critical need or hardship.”⁴⁴ Perhaps seeking to respond to Governor Christie’s plea for greater committee efficiency, any application the five-member committee fails to act upon within thirty days is automatically subject to the residency requirement.⁴⁵ Structurally, the committee is comprised of three appointees from the Governor, one from the Speaker of the General Assembly, and a final member appointed by the President of the Senate.⁴⁶ Each appointment lasts a term not to exceed five years.⁴⁷ As this five-member committee has the power to designate who can avoid the requirement as a critical hardship, the committee’s interpretation and construal of “critical hardship” will determine the breadth of the exemption.

Since New Jersey has passed its first comprehensive statewide residency requirement affecting all current⁴⁸ and future public employees of the state, questions of whether the law is constitutional, and perhaps more important, prudent, are implicated. Although this

⁴¹ *Id.* The initial report was to be filed within sixty days of the effective date of September 1, 2011. *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ N.J. STAT. ANN. § 52:14-7 (West 2010).

⁴⁵ *Id.* Indubitably, the standard could have been to accept rather than reject any application the committee failed to act upon. It is relatively unknown what volume of hardship exemptions will be requested at this time.

⁴⁶ § 52:14-7.

⁴⁷ *Id.*

⁴⁸ Even with the incorporation of the grandfather requirement, the New Jersey First Act still burdens any employee residing outside the State as he or she could face termination after a break in public service lasting longer than one week.

Comment focuses primarily on the constitutional implications of imposing a comprehensive state residency requirement on all employees of New Jersey, the constitutional and policy arguments set forth would similarly apply to residency requirements limited to a county or municipality.⁴⁹

Part II of this Comment traces the history and use of residency requirements, with a particularized focus on the jurisprudence of the U.S. Supreme Court and the New Jersey Supreme Court with regard to continuing residency requirements for public employees. Part III analyzes potential constitutional arguments, under both the New Jersey and Federal Constitutions, and other policy-based arguments that could potentially invalidate a comprehensive statewide residency requirement like the New Jersey First Act under an Equal Protection, Privileges and Immunities, or Dormant Commerce Clause constitutional challenge. Part IV provides a summary of the New Jersey First Act and the constitutional and policy-based concerns of imposing a comprehensive residency requirement on all public employees. As a general conclusion, this Comment surmises that the passing of a comprehensive statewide residency requirement for New Jersey, albeit perhaps imprudent, will likely withstand constitutional challenges whether brought under the New Jersey or Federal Constitution.

II. THE HISTORY AND JURISPRUDENCE OF CONTINUING RESIDENCY REQUIREMENTS

A. *The Legislative and Policy Component to Continuing Residency Requirements*

Both durational and continuing residency requirements have a long history stretching back to the English feudal system that subsequently became American norms incorporated and learned through the British colonies.⁵⁰ In 1601, Parliament passed *An Act for*

⁴⁹ I make this statement willfully admitting the argument cannot be as neatly levied against city, county, or municipal residency requirements depending on the argument considered. For example, a claim under the Privileges and Immunities Clause is stronger with respect to a statewide comprehensive residency requirement, such as the New Jersey First Act, if one perceives the scope of the clause as not applying to intrastate travel. *See generally* Andrew C. Porter, Comment, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820, 836–37 (1992) (speculating that a right to intrastate travel could call into question the constitutionality of a multitude of local laws, including residency requirements).

⁵⁰ CHARLES S. RHYNE, WILLIAM S. RHYNE & STEPHAN P. ELMENDORF, *THE*

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the Relief of the Poor as part of the Elizabethan Poor Laws, which created parishes to coordinate aid to the local poor.⁵¹ In 1662, Parliament passed An Act for the Better Relief of the Poor of this Kingdom, giving local justices the ability to return newly arrived poor to their place of origin within forty days of arrival if the individual was viewed as becoming a burden upon the town.⁵² The 1662 Act instituted a durational residency requirement that was inherently protectionist of the local tax base by allowing the return of a poor, sick, or otherwise incapable individual to his or her place of origin.⁵³ This effectively forced each community to bear the tax burden of its own poor.⁵⁴ Since the birthplace of illegitimate children served as their places of return if they happened to become poor and tax burdens on the community, local parish leaders were incentivized to send an unwed pregnant woman to another parish immediately prior to giving birth or to bribe a man from another parish to marry her.⁵⁵

Though originating in England, continuing residency requirements developed their own history in the United States. By the late 1800s, these requirements had become widely disseminated as a means of creating a restricted class of public employment positions in the police force or city hall that could be farmed out to those who paid patronage to the alderman victor in earlier periods of political uncertainty.⁵⁶ In return, the alderman⁵⁷ received a reliable vote in future elections because the individual's employment position depended directly on the alderman's future success.⁵⁸ Additionally, the alderman could rely on the loyalty of these individuals for law enforcement investigations, obtaining bribes, or collecting protection money, with the public employees receiving their own personal gains in the form of "kickbacks" and job security.⁵⁹

In an attempt to obviate the past mechanisms of political

CONSTITUTIONALITY OF RESIDENCY REQUIREMENTS FOR MUNICIPAL OFFICIALS AND EMPLOYEES 45 (1977).

⁵¹ An Act for the Relief of the Poor, 1601, 43 Eliz. 1, c. 2 (Eng.).

⁵² An Act for the Better Relief of the Poor of this Kingdom, 1662, 14 Car. 2, c. 12 § 1, 2 (Eng.).

⁵³ See Peter Higginbotham, *The Poor Laws*, THE WORKHOUSE (2012), <http://www.workhouses.org.uk/poorlaws>.

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ WILLIAM ANDERSON, *AMERICAN CITY GOVERNMENT* (1925).

⁵⁷ An "alderman," also known as an "alderperson," is "a member of a city council or other local governing body." BLACK'S LAW DICTIONARY (9th ed. 2009).

⁵⁸ ANDERSON, *supra* note 56.

⁵⁹ *Id.*

corruption, proposals to institute a merit-based system of pay came to be viewed as a potential solution to onerous residency requirements.⁶⁰ Despite evidence of early advocacy against continuing residency requirements, cities around the country, with the exception of Berkeley and Washington, retained their residency requirements for police officers.⁶¹ When World War II created a shortage of eligible police officers in Dallas, however, the city was forced to abandon its targeted residency requirement to recruit a sufficient number of officers.⁶² After Portland removed its comprehensive residency requirement in the early 1960s by way of charter amendment, New York and Boston followed suit upon subsequently removing their residency requirements.⁶³ Only a few big cities retained their residency requirements by the late 1960s.⁶⁴ In other cities and parts of the country, residency requirements were kept on the book but remained widely unenforced.⁶⁵

As residency requirements were being retracted or not enforced, critics pressed on with arguments that the requirements were needed to alleviate the cities' financial distress, to maintain racial balance within the police force, and to improve the quality of law enforcement.⁶⁶ Their campaign was unsuccessful in most areas during the early 1970s, with the exception of Detroit and Los Angeles.⁶⁷ When the horrendous fiscal situation of the early 1970s surfaced, however, cities reevaluated and began to, again, enforce their residency requirements.⁶⁸ Mayor Beame of New York pleaded for a city-wide comprehensive residency requirement, believing that the fiscal plight and rampant unemployment in the city created an entitlement right to municipal jobs for people living within city limits.⁶⁹

⁶⁰ See Wisc. Policy Research Inst., *The Milwaukee Teacher Residency Requirement: Why It's Bad for Schools, and Why It Won't Go Away*, 19 WIS. POL'Y RES. INST. REP. 5, 5 (June 2006) [hereinafter MPS Report].

⁶¹ See ROBERT S. FOGELSON, *BIG-CITY POLICE* 82 (1977); COMM. ON THE D.C., *REMOVAL OF RESTRICTION ON RESIDENCE OF MEMBERS OF THE POLICE DEPARTMENT*, H.R. DOC. NO. 855, at 1-2 (1935).

⁶² See FOGELSON, *supra* note 61, at 182.

⁶³ *Id.*

⁶⁴ Brian R. Johnson, Greg L. Warchol & Vic W. Bumphus, *Police Residential Requirements: An Exploratory Analysis*, 26 J. COLLECTIVE NEGOTIATIONS 43, 45 (1997).

⁶⁵ See FOGELSON, *supra* note 61, at 182.

⁶⁶ *Id.* at 306.

⁶⁷ *Id.* at 307.

⁶⁸ *Id.*

⁶⁹ *RESIDENCY PLAN GAIN IN COUNCIL: Would Limit Municipal Jobs to Workers*

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The reversion to residency requirements protectionist of local public employment has been attributed to the fiscal crisis many cities experienced during the early 1970s.⁷⁰ Albeit with some exceptions, courts generally rejected early challenges to the constitutionality of residency requirements.⁷¹ The ability to use these requirements to insulate local public employment positions and create local jobs in hard economic times likely provided guidance to legislatures elsewhere and facilitated the subsequent widespread proliferation of these requirements.

B. Judicial Discourse Regarding Continuing Residency Requirements

1. The *Kennedy* Case and the Initial Challenge to Continuing Residency Requirements in New Jersey under the Equal Protection Clause

Aside from unsuccessful political attempts to extinguish residency requirements, New Jersey jurisprudence has remained indubitably steadfast in deferring to legislative decisions, regardless of whether the plaintiff challenged a targeted or comprehensive residency requirement. In *Kennedy v. City of Newark*, the New Jersey Supreme Court first confronted arguments regarding the constitutionality of a comprehensive residency requirement that had been enacted in Newark in 1932.⁷² The Newark ordinance required all public officers and employees to reside within the city's limits.⁷³ After the disclosure information obtained from "loyalty oaths" revealed that 585 employees were non-residents in violation of the comprehensive requirement and therefore subject to termination, the disgruntled employees argued that the New Jersey State Constitution⁷⁴ insulated the employees from loss of continued

Living in City, N.Y. TIMES, May 30, 1975, at 35.

⁷⁰ Peter K. Esinger, *Municipal Residency Requirements and the Local Economy*, 64 SOC. SCI. Q. 85, 85-95 (1983).

⁷¹ Compare *Trainor v. City of Newark*, 368 A.2d 381, 385 (N.J. Super. Ct. App. Div. 1976) (holding that Newark's comprehensive residency requirement was not unconstitutional by virtue of statutory exemptions for police and firefighters), with *Hanson v. Unified Sch. Dist.*, 364 F. Supp. 330, 334 (D. Kan. 1974) (holding a residency requirement for teachers unconstitutional under the Equal Protection Clause).

⁷² 148 A.2d 473, 475 (N.J. 1959).

⁷³ *Id.*

⁷⁴ See N.J. CONST., art. I, para. 1 ("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and

employment.⁷⁵ Chief Justice Weintraub framed the issue not as “whether a man is free to live where he will” but whether “he may live where he wishes and at the same time insist upon employment by government.”⁷⁶ Although the requirement had never been enforced against a single resident despite being on the books for thirty-seven years prior to *Kennedy*, the New Jersey Supreme Court held for the city by reasoning that the “missing link” of “official knowledge” of the violations warranted enforcement against the plaintiff public employees.⁷⁷

The *Kennedy* decision was important because it established an early precedent in New Jersey that an equal protection argument under the State Constitution could not be utilized as a means of obviating a comprehensive residency requirement. Additionally, the Court implicitly recognized that the rationale behind the ordinance could not have been merely to require emergency personnel to reside in the city in order to be responsive to emergency situations, as its application covered other public employees.⁷⁸ Instead, the Court accorded deference to the decision that a comprehensive residency requirement could be legitimized under the “public coffer theory”⁷⁹

protecting property, and of pursuing and obtaining safety and happiness.”).

⁷⁵ *Kennedy*, 148 A.2d at 475.

⁷⁶ *Id.* at 476.

⁷⁷ *Id.* This suggests that there would be some argument that would exculpate a plaintiff from the requirement upon a showing of both willful misfeasance and official knowledge of the act. Justice Pashman, in a later dissent, reasoned that the presence of official knowledge of violations of some twenty-one employees constituted arbitrary discrimination that violated the Equal Protection Clause and rendered the ordinance imputing the residency requirement unenforceable. *See Abrahams v. Civil Serv. Comm’n*, 319 A.2d 473, 503–04 (N.J. 1974) (Pashman, J., dissenting).

⁷⁸ The classes of employees that come to mind when considering this targeted residency requirement would be EMT personnel, firefighters, police officers, and other public employment positions necessitating a response during emergency situations.

⁷⁹ *See People v. Crane*, 108 N.E. 427, 429 (N.Y. 1915), *affirmed*, 239 U.S. 195 (1915) (providing for a “principle of exclusion” allowing “the restriction of the resources of the state to the advancement and profit of the members of the state”). *But see Graham v. Richardson*, 403 U.S. 365, 374 (1971) (rejecting the public interest doctrine of conditioning the receipt of a State benefit on the receipt of tax contributions); *Shapiro v. Thompson*, 394 U.S. 618, 632 (1969) (dismissing the rationale that a State could apportion a benefit between citizens classified based on past tax contributions). It is worth noting that both of these decisions came after *Kennedy*, where the “public coffer” reasoning was accepted. *See Kennedy*, 148 A.2d at 476 (The court endorsed Newark’s ordinance on “common acceptance of the proposition that the Legislature may well find the public interest is advanced by residence within the political unit which provides the pay.”).

and upon legislative balancing that residency would induce an employee to perform better.⁸⁰ Moreover, the Court implied that the issue was a political question best resolved by the political process and surmised that the plaintiffs should bring their grievances “to the local legislative body” or directly to the state legislature.⁸¹

Subsequent to the *Kennedy* decision, in *Detroit Police Officers Ass’n v. City of Detroit*, the U.S. Supreme Court dismissed, for lack of a substantial federal question, a challenge to targeted residency requirements for police officers in the city of Detroit.⁸² The Michigan Supreme Court previously held that there was a rational basis for requiring police officers to reside in the city as a condition of employment because their job duties were naturally distinguishable “from all other city employees.”⁸³ The Court used the specific example of the requirement incumbent upon all police officers to carry their weapons during off-duty hours as evidencing that the police were “a semi-military organization subject at all times to immediate mobilization, which distinguishe[d] this type of employment from every other in the classified service.”⁸⁴

Justice Brennan’s concurrence argued that deference should be accorded to the legislative determination and proffered some insight into the ends sought through the requirement.⁸⁵ He posited that the legislature sought to coordinate an improved relationship between the African American residents and the police force of Detroit.⁸⁶ The residency requirement had been enacted when Detroit’s population was over forty percent African American and the surrounding suburbs had a less than ten percent African American population.⁸⁷ Statistics indicate that only a dismal five percent of Detroit’s police force was African American in 1967, thereby providing support for Justice Brennan’s allusions to a possible legislative desire to maintain a racial balance between Detroit, its suburban population, and its police force.⁸⁸ Being that a dismissal for want of a substantial federal question was a decision on the merits, *Detroit Police Officers Ass’n*

⁸⁰ *Kennedy*, 148 A.2d at 476.

⁸¹ *Id.*

⁸² *Detroit Police Officers Ass’n v. City of Detroit*, 190 N.W.2d 97, 97 (Mich. 1971), *appeal dismissed*, 405 U.S. 950 (1972).

⁸³ *Id.* at 97–98.

⁸⁴ *Id.* at 98.

⁸⁵ *Id.* (Brennan, J., concurring).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See FOGELSON, *supra* note 61, at 248.

signaled that the protection of the powerful *stare decisis* doctrine could now be invoked to combat challenges to continuing residency requirements for police officers levied under the Equal Protection Clause.⁸⁹

2. More Rational Reasons for Residency Requirements and Challenges Claiming a Fundamental “Right to Travel”

A fuller exposition of the potential rational reasons for enforcing a continuing residency requirement came from the California case *Ector v. City of Torrance*, where the plaintiff, a city librarian, challenged a residency requirement.⁹⁰ The librarian urged the court to apply heightened scrutiny for violations of her “right to travel” announced as fundamental in *Shapiro*.⁹¹ Foreshadowing the U.S. Supreme Court’s later decision in *McCarthy v. Philadelphia Civil Service Commission*,⁹² the California Supreme Court rejected the plaintiff’s argument to apply the *Shapiro* fundamental right analysis by relegating it to a narrower application limited to durational residency requirements only.⁹³ The California Supreme Court also accepted the issue as Justice Weintraub had professed it in *Kennedy* and applied a rational basis test to the equal protection challenge.⁹⁴ While accepting the reasoning of *Detroit Police Officers Ass’n* regarding the natural and distinguishing characteristics of police officers and the need for emergency personnel, the California Supreme Court enumerated a list submitted by amici curiae indicating multiple rational ends sought to be obtained through continuing residency requirements.⁹⁵ The court found that any of the potential reasons

⁸⁹ See *Ahern v. Murphy*, 457 F.2d 363, 364 (7th Cir. 1972).

⁹⁰ 514 P.2d 433, 434 (Cal. 1973).

⁹¹ *Id.*; see *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969) (acknowledging that the right to travel is ordinary and fundamental to the Federal Union).

⁹² 424 U.S. 645 (1967).

⁹³ *Ector*, 514 P.2d at 436–37.

⁹⁴ *Id.*

⁹⁵ *Id.* at 436. Specifically the court provided that: the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city’s conditions and by a feeling of greater personal stake in the city’s progress; diminution of absenteeism and tardiness among municipal personnel; ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local

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provided would serve as a rational basis for the residency requirement, and thus upheld imposing its strictures on the public librarian.⁹⁶

The New Jersey Supreme Court first confronted a challenge to a continuing residency requirement predicated on a fundamental “right to travel” argument in *Abrahams v. Civil Service Commission*, where the same Newark residency requirement that had been attacked in *Kennedy* under the New Jersey State Constitution’s equal protection grounds was once again challenged in light of the U.S. Supreme Court’s decision in *Shapiro*.⁹⁷ The *Abrahams* case was decided at a time when residency requirements had become attractive policy tools for legislatures to combat the “white flight” of public employees who began moving to the suburbs in mass exodus from large cities during the 1960s.⁹⁸ Newark’s experience was particularly emblematic; the city lost 70,000 white residents between the years of 1960 and 1967.⁹⁹ This figure included the growing number of public employees that retained two addresses, one in the city and one in the suburbs, as a means of deceptively complying while flouting the legislative intent of the residency requirement.¹⁰⁰ New Jersey later closed this loophole in its decision in *Mercadante v. City of Paterson*, where the Court held that police and firefighters maintaining dual addresses, one inside the city and one outside, failed to comply with the statutory residency requirement.¹⁰¹

In *Abrahams*, a law department secretary had provided a Newark address when applying for her position in 1966 and moved into Newark in 1967.¹⁰² In 1970, however, she left Newark to live in nearby Union and was terminated from her position for violating the residency requirement.¹⁰³ The secretary argued that the ordinance violated her constitutional right to travel under the precedent of

expenditure of employees’ salaries were all rational ends sought to be obtained through the use of residency requirements.

Id.

⁹⁶ *Id.*

⁹⁷ *Abrahams v. Civil Serv. Comm’n*, 319 A.2d 483, 484 (N.J. 1974). For a discussion of the *Kennedy* decision, see text accompanying notes 5, 7, 59–61.

⁹⁸ See Johnson, Warchol & Bumphus, *supra* note 64, at 45.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ 266 A.2d 611, 613–14 (N.J. Super. Ct. Ch. Div. 1970), *affirmed*, 275 A.2d 440 (1971).

¹⁰² *Abrahams v. Civil Serv. Comm’n*, 319 A.2d 483, 484 (N.J. 1974).

¹⁰³ *Id.*

Shapiro and further that the ordinance was enforced discriminatorily against her.¹⁰⁴ The Court quickly dismissed the precedential value of *Shapiro* as applied to the continuing residency requirement at issue, noting the distinction between durational and continuing residency requirements.¹⁰⁵ Furthermore, the Court approvingly cited the rational basis factors first enunciated by the California Supreme Court in *Ector* in support of enforcing continuing residency requirements.¹⁰⁶ The specific example of lowering unemployment in Newark to be achieved via the residency requirement was accepted as a legitimate policy end for the requirement.¹⁰⁷

With regard to the argument of selective enforcement, the Court's majority took the position that the factual record had unearthed no evidence of a policy of non-enforcement.¹⁰⁸ Interestingly, the Court qualified this with a reminder that there would "be no excuse for continued non-enforcement of the ordinance in the future if in fact that ha[d] been the case in the past."¹⁰⁹ In actuality, the factual record had offered more than scant evidence of selective enforcement.¹¹⁰ Aside from the law department's nine attorneys, who were statutorily exempt from the requirement, a statistical sample taken of 142 other department employees had revealed that twenty-one were non-residents.¹¹¹

Justice Clifford concurred in the judgment of *Abrahams* though he lamented, "[i]t is difficult to escape the impression that we are reviewing this case with blinders on."¹¹² Justice Clifford was referring to the fact that the secretary had failed to raise questions in the trial court regarding the propriety of certain statutory exemptions afforded to other classes of employees that would have strengthened the argument regarding the unconstitutionality, and hence overall

¹⁰⁴ *Id.* at 484–85 (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)). The secretary also argued that the "special circumstances" exception provided for in the ordinance was void for vagueness, but this issue is not considered further. *Id.*

¹⁰⁵ *Id.* at 486.

¹⁰⁶ *Id.* at 489.

¹⁰⁷ *Id.*

¹⁰⁸ *Abrahams*, 319 A.2d at 490–91.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 485.

¹¹¹ *Id.* The dissenting Justice Pashman argued forcefully that this significant number of non-complying residents combined with official knowledge constituted arbitrary discrimination that should render the requirement unenforceable under the precedent of *Kennedy*. See *id.* at 503 (Pashman, J., dissenting).

¹¹² *Id.* at 491 (Clifford, J., concurring).

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enforceability, of the residency requirement.¹¹³ Specifically, Justice Clifford was referencing statutory exemptions that the state legislature had passed that prohibited municipalities from using residency as a condition for “original appointment, continued employment, promotion, or for any other purpose . . .” for police¹¹⁴ and firefighters.¹¹⁵ Thus, Justice Clifford may have implicitly been alluding to the need for the requirement to be uniformly applied to all classes of employees.¹¹⁶

The dissenting Justice Pashman viewed the residency requirement unconstitutional as both “an infringement upon the right to travel unsupported by a sufficiently compelling interest to justify the restriction” and as a violation of the Equal Protection Clause.¹¹⁷ With regard to the issue of selective enforcement that the plaintiff raised, Justice Pashman acknowledged that the majority’s holding effectively would require a stenographer to reside inside of the city, while a police officer would be free to live where he or she may choose.¹¹⁸ Pashman described Chief Justice Weintraub’s earlier refusal to find a compelling state interest or fundamental right protected by the New Jersey Constitution as being motivated by Weintraub’s personal disavowal of such concepts as ambiguous and

¹¹³ *Id.*

¹¹⁴ *See* N.J. STAT. ANN. § 40A:14-122.1 (West 2010). In its entirety the statute provides:

No municipality shall pass any ordinance, resolution, rule, regulation, order or directive, making residency therein a condition of employment for the purpose of original appointment, continued employment, promotion, or for any other purpose for any member of a police department and force and any such ordinance, resolution, rule, regulation, order or directive in existence on the effective date of this act or passed hereafter shall be void and have no force or effect.

Id.

¹¹⁵ N.J. STAT. ANN. § 40A:14-9.1 (West 2010). The statutory language reads the same as § 40A:14-122.1, with the only exception being a change of the “police” to “fire.” *Id.*

¹¹⁶ The theoretical basis of Justice Clifford’s statutory exemptions for certain classes of employees is arguably relevant to the exemption process incorporated into the New Jersey First Act, particularly the blanket exemption for persons with specialized skill or knowledge at institutions of higher education. This exemption is the result of reasoned opinion that it is necessary to help keep New Jersey’s higher public education competitive. *See* § 52:14-7. Contrarily, one can only surmise that an exemption for police and firefighters from targeted localized residency requirement is anything other than the result of a successful lobby.

¹¹⁷ *See Abrahams*, 319 A.2d at 491 (Pashman, J., dissenting).

¹¹⁸ *Id.* at 498.

unhelpful to judicial decision-making.¹¹⁹ With respect to “fundamental” constitutional rights and the varying levels of scrutiny under Equal Protection challenges, Justice Weintraub had previously elaborated:

[i]f a right is somehow found to be “fundamental,” there remains the question as to what State interest is “compelling” and there, too, we find little, if any, light. Mechanical approaches to the delicate problem of judicial intervention under either the equal protection or the due process clauses may only divert a court from the meritorious issue or delay consideration of it. *Ultimately, a court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary.* In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.¹²⁰

Justice Pashman rejected Weintraub’s position, reasoning that although there was no per se fundamental right to public employment, the state could not condition the privilege of public service on the surrender of a constitutional right.¹²¹ In this way, Justice Pashman cast the issue in a light more favorable to the burdened public employee and surmised the right ought to be protected under the New Jersey State Constitution as an undue restriction on the right to travel.¹²²

A separate but related scrutiny question that had created some confusion among courts after *Shapiro* was whether a compelling government interest standard of review applied to all residency requirements or just the durational variety. Despite a footnote in *Shapiro* making it explicitly clear that the case’s holding was narrow and not meant to apply to bona fide continuing residency requirements,¹²³ a federal court in New Jersey applied a compelling government interest standard and, based on the precedent of *Shapiro*, upheld a residency requirement for police and firefighters under this

¹¹⁹ See *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973).

¹²⁰ *Id.* (emphasis added).

¹²¹ See *Abrahams*, 319 A.2d at 498 (Pashman, J., dissenting).

¹²² *Id.* at 495.

¹²³ *Shapiro v. Thompson*, 394 U.S. 618, 637 n.21 (1969) (“We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth.”).

heightened standard.¹²⁴ The *Krzewinski v. Kugler*, misapplication of the *Shapiro* precedent was also adopted in *Fraternal Order of Police Youngstown Lodge No. 28 v. Hunter*, where the court used the compelling state interest standard to strike down a police residency requirement.¹²⁵

In 1976, the U.S. Supreme Court directly confronted the question of *Shapiro*'s precedential value in *McCarthy v. Philadelphia Civil Service Commission*, where a firefighter challenged the termination of his sixteen-year tenure of employment.¹²⁶ The firefighter had relocated his principal residence from Philadelphia to New Jersey in violation of a residency requirement and argued that his termination violated his fundamental right to travel under the Privileges and Immunities Clause.¹²⁷ The Court's per curiam opinion briskly recounted that a targeted residency requirement for police officers in Detroit was found "not irrational" by virtue of an earlier dismissal for want of a substantial federal question in *Detroit Police Officers Ass'n*.¹²⁸ Further, the Court directly specified that the constitutional right of interstate travel, though offering the more stringent compelling governmental interest standard of review, was not implicated by a continuing residency requirement under the precedent of *Shapiro*.¹²⁹

3. Summation of Case Law

The New Jersey Supreme Court first confronted the constitutionality of comprehensive residency requirements in *Kennedy* and the decision became the foundation for subsequent constitutional challenges.¹³⁰ The *Kennedy* decision served as an early indication that the New Jersey Supreme Court would defer to legislative determinations and squash the proliferation of future claims against comprehensive residency requirements under the State Constitution. The U.S. Supreme Court's dismissal of *Detroit Police Officers Ass'n* reinforced that the *Kennedy* decision had

¹²⁴ *Krzewinski v. Kugler*, 338 F. Supp. 492, 489 (D.N.J. 1972) (citing *Shapiro*, 394 U.S. 618).

¹²⁵ *Fraternal Order of Police Youngstown Lodge No. 28 v. Hunter*, 49 Ohio App. 2d 185, 198 (Ohio App. Div. 1973), *cert. denied*, 424 U.S. 977 (1976).

¹²⁶ 424 U.S. 645, 645 (1976).

¹²⁷ *Id.*

¹²⁸ *Id.* at 645–46.

¹²⁹ *Id.* at 646–47.

¹³⁰ See discussion *supra* Part II.B.1.

appropriately deferred to the legislature's balancing.¹³¹ Moreover, the *Ector* decision from California supplied an assortment of policy objectives sought to be obtained through the use of continuing residency requirements.¹³² In *Abrahams*, the New Jersey Supreme Court followed the precedent of the *Kennedy* decision and the enumeration of policy justifications from *Ector*. Additionally, the *Abrahams* decision signified the New Jersey Supreme Court's rejection of the argument that continuing residency requirements violated a right to travel protected under the compelling governmental interest standard of *Shapiro*.¹³³ Though at least one federal court in New Jersey had applied a heightened scrutiny to a continuing residency requirement under the precedent of *Shapiro*,¹³⁴ any aspirations for more scrupulous review under the Privileges and Immunities Clause became largely foreclosed by the U.S. Supreme Court's decision in *McCarthy*.¹³⁵

III. CONSTITUTIONAL ARGUMENTS

This Comment examines three constitutional arguments that potential plaintiffs could levy against continuing residency requirements, with a focus on the jurisprudence of New Jersey and the recently enacted New Jersey First Act. The first argument posits that imposing a residency requirement as a condition of public employment violates a fundamental right to travel preserved under the Privileges and Immunities Clause of the Federal Constitution. This argument additionally considers the possibility that residency requirements could violate a fundamental right to travel secured by state constitutional provisions. The second argument propounds that continuing residency requirements impermissibly discriminate between classes of persons in violation of the Equal Protection Clause. This section similarly considers the applicability of equal protection arguments brought under parallel provisions found in state constitutions. The final constitutional argument considers the possibility of challenging a statewide residency requirement, such as the New Jersey First Act, as an impermissible burden on interstate commerce in violation of the Commerce Clause, under a Dormant Commerce Clause analysis.

¹³¹ See discussion *supra* Part II.B.1.

¹³² See discussion *supra* Part II.B.2.

¹³³ See discussion *supra* Part II.B.2.

¹³⁴ See discussion *supra* Part II.B.2.

¹³⁵ See discussion *supra* Part II.B.2.

A. *A Fundamental Right to Travel?*

In 1869, the U.S. Supreme Court described the purpose of the Privileges and Immunities Clause¹³⁶ expansively, acclaiming that “it was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.”¹³⁷ Despite the suggestive sweeping applicability of the Privileges and Immunities Clause in *Paul v. Virginia*, its use has been severely restricted and tremendously circumscribed by the jurisprudence of the U.S. Supreme Court—including in regard to continuing residency requirements.

After the *McCarthy* decision,¹³⁸ the controversy over residency requirements seemed settled to the extent that rational basis review would apply to equal protection challenges, and that the Privileges and Immunities Clause would not offer the same compelling government interest standard applied to the durational residency requirements of *Shapiro*.¹³⁹ Nevertheless, this did not foreclose all opportunities for states to offer a more encompassing constitutional right to travel that would subject continuing residency requirements to a higher level of constitutional scrutiny than the protections available under the federal system. The Federal Constitution merely sets a floor providing a set of the most basic rights assured to each citizen.¹⁴⁰ As the U.S. Supreme Court explained in *Pruneyard Shopping Center v. Robbins*, each state may “adopt in its own Constitution

¹³⁶ U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).

¹³⁷ *Paul v. Virginia*, 75 U.S. 168, 180 (1869). The entirety of the passage provides: It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

Id.

¹³⁸ *McCarthy v. Phila. Civil Serv. Comm’n*, 424 U.S. 645 (1967); see discussion *supra* Part II.B.2.

¹³⁹ See *Shapiro v. Thompson*, 394 U.S. 618, 637 (1969); see discussion *supra* Part II.B.3.

¹⁴⁰ See *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980).

individual liberties more expansive than those conferred by the Federal Constitution.”¹⁴¹

In *Donnelly v. City of Manchester*, a case decided before *McCarthy*, the New Hampshire Supreme Court considered a schoolteacher’s challenge to a city ordinance imposing a comprehensive residency requirement on the city’s employees, effective twelve months from the initial date of employment.¹⁴² The court posited that the requirement impinged upon the schoolteacher’s fundamental right protected under both the State and Federal Constitutions.¹⁴³ Although public employment was not inherently a fundamental right, the “privilege” of being publicly employed could not “be conditioned upon a surrender of a fundamental constitutional right.”¹⁴⁴ Thus, instead of deferring to the legislature, the *Donnelly* court utilized a fundamental rights standard that considered “the importance of the public benefit . . . balanced against the seriousness of the restriction of the private right sought to be imposed.”¹⁴⁵ The court focused on the broad application of the ordinance, which extended to every public employee, and concluded that the legislative end of bringing economic benefits unto the city could not justify such an overinclusive ordinance.¹⁴⁶ The *Donnelly* court did not discount the possibility of a constitutionally sound residency requirement if properly limited in scope of application:

There is nothing in the record before us nor have any reasons been advanced which would justify the broad restrictions of this ordinance. *We do not say that there are no employees whose residence near their place of duty may not be important enough to justify a restriction upon their place of residence* but if such restrictions are permissible as to some this does not justify the broad and all inclusive requirement that all employees live within the city limits.¹⁴⁷

After the *McCarthy* decision, there was a question about the continued vitality of *Donnelly* since it had explicitly relied on the

¹⁴¹ *Id.*

¹⁴² *Donnelly v. City of Manchester*, 274 A.2d 789, 789–90 (N.H. 1971).

¹⁴³ *Id.* at 791.

¹⁴⁴ *Id.* This mirrors Justice Pashman’s framing of the issue in his dissent in *Abrahams*. See *Abrahams v. Civil Serv. Comm’n*, 319 A.2d 483, 498–99 (N.J. 1974) (Pashman, J., dissenting).

¹⁴⁵ *Donnelly*, 274 A.2d at 791.

¹⁴⁶ See *id.* at 792.

¹⁴⁷ *Id.* at 791 (emphasis added).

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Privileges and Immunities Clause in the Federal Constitution.¹⁴⁸ Subsequent to the *McCarthy* decision, the town of Manchester reenacted a comprehensive residency requirement identical to the one formerly struck down as unconstitutional by the New Hampshire Supreme Court, with the only difference being the addition of a grandfather clause that barred the requirement from affecting current employees.¹⁴⁹ Despite the overshadowing precedent of *McCarthy* rejecting a claim under the Privileges and Immunities Clause, the New Hampshire Supreme Court utilized an elevated constitutional scrutiny under the New Hampshire State Constitution and struck down the Manchester comprehensive residency requirement a second time in *Angwin v. City of Manchester*.¹⁵⁰

Donnelly is a paradigm of a state's constitution proffering a right to travel above and beyond the protections afforded by the Federal Constitution. The recognition of a fundamental right to live where one chooses while still possessing the opportunity to hold a position in public employment under the New Jersey State Constitution, albeit unlikely, would arguably provide a constitutional form of protection against legislative decisions seeking to restrict an important freedom. While it would not foreclose the possibility of residency requirements for certain classes of employees, heightened judicial scrutiny is capable of circumscribing legislative residency requirements that include classes of employees without justification.

A perceived benefit of this type of judicial review may be that it allows for a more scrupulous analysis of the facts as they exist with regard to the particular circumstances of the jurisdiction seeking to enforce a continuing residency requirement. In *Seabrook Police Ass'n v. Town of Seabrook*,¹⁵¹ the Supreme Court of New Hampshire addressed the constitutionality of a residency requirement providing that all police officers must reside in the town as a condition of employment.¹⁵² The court scrutinized the factual circumstances intensely, pointing to "the existence of a nuclear power plant, a greyhound racing track, a resident beach population in an area accessible only by bridge, and a town population that doubles in the summer months" as mitigating factors weighing in support of the

¹⁴⁸ See *Angwin v. City of Manchester*, 386 A.2d 1272, 1272 (N.H. 1978).

¹⁴⁹ *Id.*

¹⁵⁰ See *id.* at 1273.

¹⁵¹ 635 A.2d 1371 (N.H. 1993).

¹⁵² *Id.* at 1372.

residency requirement.¹⁵³ The court also separated police officers from other classes of employees when it acknowledged that the off-duty presence of officers served an important element of the policing function.¹⁵⁴ Thus, the court surmised that the totality of the police officers' duties distinguished their services from other employees and warranted the unequal treatment resulting from the residency requirement.¹⁵⁵

Comparing New Jersey's approach with that of New Hampshire demonstrates the benefits proffered by elevated constitutional scrutiny. The *Donnelly* and *Angwin* decisions explicitly affirm that a comprehensive residency requirement will be found to violate the fundamental right to travel guaranteed by elevated protection under the New Hampshire State Constitution.¹⁵⁶ *Seabrook Police Ass'n* further elucidates that a targeted residency requirement for police officers in a town with unique factual circumstances can be upheld despite the elevated scrutiny.¹⁵⁷ This suggests that allowing the judiciary to evaluate the propriety of the legislative means and ends may appropriately circumscribe the scope of residency requirements to those situations where they are legitimately connected with the employee's employment performance, particularly when the legislature has ignored or improperly balanced constitutional concerns.¹⁵⁸

The New Jersey First Act's attempt to institute a comprehensive residency requirement for every public employee in the state of New Jersey would likely be found unconstitutional under the review provided by the New Hampshire State Constitution, as being an overinclusive and illegitimate infringement upon the constitutional rights of the employees. New Jersey's approach has historically been asymmetrical, if not completely opposed, to the New Hampshire

¹⁵³ *Id.* at 1374.

¹⁵⁴ *See id.*

¹⁵⁵ *Id.* at 1375.

¹⁵⁶ *See Angwin v. City of Manchester*, 386 A.2d 1272, 1272-73 (N.H. 1978) (reinforcing and reapplying the heightened protections of *Donnelly* under the New Hampshire State Constitution).

¹⁵⁷ *See Seabrook Police Ass'n*, 635 A.2d at 1375.

¹⁵⁸ One could, however, criticize that a court is improperly legislating by imposing its own views instead of deferring to the legislator. This comment fundamentally assumes that the balancing of rights approach asserted in *Donnelly* would more readily safeguard personal liberty and the pursuit of happiness to a greater extent than rational basis scrutiny.

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approach to continuing residency requirements.¹⁵⁹ The legislative exemptions in New Jersey for police and firefighters create a statutory framework that is hard to defend on a practical basis.¹⁶⁰ Effectively, these exemptions create a system where secretaries, waste disposal employees, and municipal office workers can be required to live in a city, county, or municipality as a condition of employment, while police and firefighters, the personnel with a presence arguably necessary during off-duty hours or emergency situations, are exempt from the requirement. Moreover, comprehensive residency requirements have routinely been upheld in New Jersey since *Kennedy* and *Abrahams*, and the pending New Jersey First Act is not likely to be subjected to any elevated or more stringent review. While an elevated standard of scrutiny would likely provide the judiciary with tools capable of circumscribing the applicable scope of residency requirements to only those employees where residency is a sensible extension of the employees' duties, this remains an unlikely possibility in light of New Jersey's past jurisprudence.¹⁶¹

In sum, arguments professing that continuing residency requirements violate a right to travel derived from the Privileges and Immunities Clause of the Federal Constitution will prove unavailing in light of the *McCarthy* decision. The New Hampshire approach offers the possibility of a more elevated scrutiny in the form of balancing the public interest served by the requirement against the loss of liberty suffered by the individual. This is accomplished through provisions in New Hampshire's State Constitution, not the Federal Constitution's Privileges and Immunities Clause. Nevertheless, the initial *Kennedy* decision and the continued deference to legislative balancing in New Jersey seem to assure that any argument positing that residency requirements violate a fundamental right to travel retained under the State Constitution will fail.

¹⁵⁹ Compare *Angwin v. City of Manchester*, 386 A.2d 1272, 1272-73 (N.H. 1978) (heightened protections under the New Hampshire State Constitution), with *Kennedy v. City of Newark*, 148 A.2d 473, 475 (N.J. 1959) (framing the issue in a way that prevents heightened constitutional scrutiny).

¹⁶⁰ See N.J. STAT. ANN. § 40A:14-9.1 (West 2010); N.J. STAT. ANN. § 40A:14-122.1 (West 2010).

¹⁶¹ This naturally would lead one to conclude that emergency workers and other classes of employees that respond to emergency situations as part of their employment function, such as firefighters and police officers, are the best candidates for residency requirements.

B. Equal Protection Challenge

The Fourteenth Amendment's Equal Protection Clause provides, in pertinent part, that "no state shall . . . deny any person within its jurisdiction the equal protection of the laws."¹⁶² In *Detroit Police Officers Ass'n* and again in *McCarthy*, the U.S. Supreme Court applied rational basis review to continuing residency requirements targeted towards police and firefighters.¹⁶³ In *United States v. Carolene Products Co.*,¹⁶⁴ the U.S. Supreme Court described rational basis review as providing a presumption of deference to economic legislation.¹⁶⁵ As economic legislation, the New Jersey First Act would enjoy a presumption of constitutionality against a challenge under the Equal Protection Clause that would only be subverted if the plaintiff could persuade the court the underlying policy reasons for the rule were wholly irrational. The presumption of constitutionality is difficult to surmount, and "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."¹⁶⁶

Continuing residency requirements create two classes of persons, those within the ambit of the requirement, and all others who, due to misfortune or personal choice, live outside the scope of the covered geographic area. Whereas the former have the opportunity to obtain public employment within the applicable jurisdiction of the residency requirement, the latter are foreclosed from the employment opportunity unless they are able and willing to relocate. The statutory classification thus creates two classes, residents and non-residents, and extends or forecloses the privilege of having an opportunity to obtain public employment on that basis. For example, the New Jersey First Act would render any non-resident of New Jersey ineligible for public employment positions throughout the state unless qualified for one of the narrow exemptions.¹⁶⁷

The rational basis legitimizations for residency requirements first enumerated in *Ector* have effectively functioned as an acute summation of the potential legislative policy reasons for instituting a

¹⁶² U.S. CONST. amend. XIV, § 1.

¹⁶³ See *Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97, 103 (Mich. 1971), *appeal dismissed*, 405 U.S. 950 (1972); *McCarthy v. Phila. Civil Serv. Comm'n*, 424 U.S. 645, 645–46 (1976) (per curiam).

¹⁶⁴ 304 U.S. 144 (1938).

¹⁶⁵ *Id.* at 152.

¹⁶⁶ *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (citation omitted).

¹⁶⁷ See N.J. STAT. ANN. § 52:14-7(b) (West 2010).

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continuing residency requirement.¹⁶⁸ An acknowledgment of the stringency of rational basis review and its virtual unwavering deference to legislative decisions requires that each of these possible legislative motivations be proven independently irrational to overturn the legislation's presumption of constitutionality. Thus, each potential legislative reason independently can serve as a sufficient means of satisfying rational basis review, and must be examined on an individual basis for legitimacy.

1. The Public Interest Theory

The public interest justification for continuing residency requirements—sometimes referred to as the public coffer theory—posits that a state may restrict the expenditure of its resources to the benefit of its own members, and at the exclusion of all others.¹⁶⁹ Operating under the assumption of the public coffer theory and viewing public employment as a privilege delegated from the state to the general public, the theory provides that these public employment positions can be restricted based on state membership alone because residents of the state provide the tax monies essential to the state's functioning.¹⁷⁰ Thus, by imposing a residency requirement, a state can better ensure that the funds it dispenses to public employees are more likely to be redistributed back into its own economy, thereby passing a tax benefit back to the state.¹⁷¹ This also appears to be the primary legislative rationale behind the New Jersey First Act, as evidenced by Senator Norcross's statement: "If you want a paycheck from New Jersey taxpayers, you should live here and pay your taxes here."¹⁷²

The New York statute upheld in *People v. Crane* is emblematic of the use of the public interest doctrine to legitimize a legislative preference for a state's own citizens. The New York statute at issue in *Crane* forbade employers for public works projects from employing

¹⁶⁸ See *Ector v. City of Torrance*, 514 P.2d 433, 436 (Cal. 1973), *cert. denied*, 415 U.S. 935 (1974); *Abraham v. Civil Serv. Comm'n*, 319 A.2d 483, 489 (N.J. 1974) (citing the factors from *Ector* with approval).

¹⁶⁹ See *People v. Crane*, 108 N.E. 427, 429 (N.Y. 1915), *affirmed*, 239 U.S. 195 (1915).

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² *Senator Norcross Proposes State Residency Law*, POLITICKER NJ (Mar. 9, 2010), <http://politickernj.com/droseman/37554/senator-norcross-proposes-state-residency-law>.

aliens as part of their labor force.¹⁷³ Justice Cardozo, then sitting on the New York Court of Appeals, avowed that the court was not defending the statute as a legislative attempt to promote efficiency but rather to promote the welfare of the “men preferred,” and “as a legitimate preference of citizens.”¹⁷⁴ Reasoning that this employment was a “privilege,” as opposed to a “right,” the New York Court of Appeals accordingly held that the state could discriminate in favor of citizens.¹⁷⁵

Although the U.S. Supreme Court approved the public coffer theory as advanced in *People v. Crane*, the theory later fell into disfavor and was repudiated in numerous cases, including *Shapiro*.¹⁷⁶ In *Shapiro*, Justice Brennan rejected the argument that a state could apportion community benefits based upon previous tax contributions.¹⁷⁷ Under the guise of this logic, a state could defend the denial of police, fire, or emergency services to a taxpayer who has failed to contribute his or her fair share as determined by the state.¹⁷⁸ The U.S. Supreme Court later explained that the public interest doctrine turned on an assumption that a state could apportion “privileges,” but not “rights,” upon the basis of citizenship.¹⁷⁹ This distinction and accompanying assumption, however, were repudiated by the U.S. Supreme Court in *Graham*.¹⁸⁰

In *Sugarman v. Dougall*, city officials of New York argued that rejection of the public interest doctrine in *Graham* was limited to public assistance, and that the precedent of *Crane* allowed the state of New York to exclude aliens from competitive civil service positions.¹⁸¹

¹⁷³ See *Crane*, 108 N.E. at 428.

¹⁷⁴ *Id.* at 429–30.

¹⁷⁵ *Id.* at 430. While it is true that the issue in *Crane* dealt with aliens, as opposed to out of state residents, the geographical and technological limitations during 1915 when the decision came down likely diminished the likelihood of residents’ commuting regularly to serve in public employment in other states. In this sense, the rule may have effectively limited these positions to New York state citizens.

¹⁷⁶ See *Shapiro v. Thompson*, 394 U.S. 618, 632 (1969).

¹⁷⁷ *Id.* at 632–33.

¹⁷⁸ See *id.* at 632–33.

¹⁷⁹ See *Graham v. Richardson*, 403 U.S. 365, 374 (1971). The Supreme Court has rejected a State’s ability to apportion different benefits according to classifications as “rights” or “privileges” in various cases subsequent to *People v. Crane* aside from *Graham*. See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (citations omitted); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

¹⁸⁰ *Graham*, 403 U.S. at 374. This case partly dealt with whether a state could impose a durational residency requirement on welfare benefits for aliens. See *id.* at 366.

¹⁸¹ See *Sugarman v. Dougall*, 413 U.S. 634, 644 (1973).

While *Crane* was not explicitly overruled, it was deemed non-controlling, and the U.S. Supreme Court held that the New York statute was unconstitutional under the Equal Protection Clause.¹⁸²

Despite the overtly protectionist undertones of the public coffer theory, it was one of the primary justifications that the New Jersey Supreme Court accepted in *Kennedy*.¹⁸³ Chief Justice Weintraub articulated that it was within the constitutional discretion of the legislature to utilize residency as a condition of public employment to “advance the economy of the locality which yields the tax revenues.”¹⁸⁴ The New Jersey Supreme Court maintained this line of reasoning in *Abrahams* even after the Supreme Court had retracted the vitality of the theory.¹⁸⁵

Some advocates in favor of residency requirements posit that removal would induce middle class public workers to leave the cities, thereby triggering an increase in urban plight and a corresponding plummet in property values.¹⁸⁶ The recent retraction of a residency requirement in Minneapolis, however, did not create the exodus of middle class public workers as opposition had anticipated.¹⁸⁷ Concerns that property values would plummet ten percent also failed to materialize.¹⁸⁸ Nonetheless, Minneapolis may be a unique example and there is no assurance that these outcomes would apply to New Jersey. Putting public policy considerations aside, the U.S. Supreme Court’s repudiation of the public interest theory should serve to invalidate its legitimacy as a rational basis for requiring an employee to live within a geographic area as a condition of employment.

2. Promotion of Ethnic Balance and Curing Unemployment

In *Ector*, the California Supreme Court cited the factors of promoting ethnic balance and providing employment opportunities as capable of withstanding scrutiny under the rational basis test.¹⁸⁹

¹⁸² *Id.* at 645–46.

¹⁸³ *See Kennedy v. City of Newark*, 148 A.2d 473, 476 (N.J. 1959).

¹⁸⁴ *See id.*

¹⁸⁵ *See Abrahams v. Civil Serv. Comm’n*, 319 A.2d 483, 485 (N.J. 1974).

¹⁸⁶ *See, e.g.*, MPS Report, *supra* note 60, at 18.

¹⁸⁷ *See Jim Nichols, Minneapolis, Like Cleveland, Had Residency Rule Overturned, But Worst Fears About Flight Didn’t Materialize*, METRO-CLEVELAND.COM (June 20, 2009, 5:03 AM), http://blog.cleveland.com/metro/2009/06/minneapolis_like_cleveland_had.html.

¹⁸⁸ *See id.*

¹⁸⁹ *See Ector v. City of Torrance*, 514 P.2d 433, 436 (Cal. 1973).

These legislative intentions appear laudable in light of the urban flight occurring during the 1970s and the resulting racial tension in inner-cities. In *Detroit Police Officers Ass'n*, a targeted residency requirement for police officers was described as a legislative device to “promote a feeling of trust, confidence and fraternity” between the Detroit police and citizenry.¹⁹⁰ Despite the potential use of a residency requirement to promote minority representation in public employment or to cure the urban ill of unemployment generally, factual circumstances may stifle continuing residency requirements from achieving this end.

A residency requirement’s ineffectiveness in promoting the legislative end of ethnic balance was observed in a more recent case where the NAACP successfully challenged the New Jersey township of Harrison’s residency requirement under Title VII in federal court.¹⁹¹ The town of Harrison had always adhered to a strict policy of limiting the hiring pool of public employees for uniformed and non-uniformed positions to applicants from the town.¹⁹² At the time when the case was brought in 1991, only Harrison residents had ever been considered for uniformed positions.¹⁹³ This led to the avowed unintended consequence of an African American never holding a position within the town.¹⁹⁴ Harrison sought to defend the requirement and relied heavily on *Abrahams*, but the reasons were rejected as “too nebulous and insubstantial” to justify the disparate impact under the more demanding Title VII standard.¹⁹⁵

While *Newark Branch, NAACP v. Harrison* is a special case involving a challenge under Title VII, the circumstances establish that presuming that the promotion of ethnic balance is a policy justification served by residency requirements is capricious because residency does not ensure a certain racial or ethnic composition.¹⁹⁶

¹⁹⁰ *Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97, 98 (Mich. 1971) (Brennan, J., concurring), *appeal dismissed*, 405 U.S. 950 (1972).

¹⁹¹ *Newark Branch, NAACP v. Harrison*, 940 F.2d 792, 804 (3d Cir. 1991). Since the challenge was brought under Title VII, the ordinance was subjected to a standard above and beyond rational basis that required the town of Harrison to produce evidence that the residency requirement furthered a legitimate business goal in a significant manner. *Id.* at 803.

¹⁹² *Id.* at 795.

¹⁹³ *Id.* at 796.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 801–02, 805.

¹⁹⁶ Harrison was not the only town in northern New Jersey with residency requirements that the NAACP targeted for their racially discriminatory effects. See generally *Fort Lee Drops Hiring Rule to Settle N.A.A.C.P. Suit*, N.Y. TIMES, Apr. 30, 1992, at

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Whereas Harrison faithfully enforced its requirement, the homogenous racial composition of the town rendered the residency requirement an impediment to achieving racial balance in public employment.¹⁹⁷ In short, more direct hiring practices would better provide a means of promoting ethnic balance in jurisdictions where this is a proper legislative end.¹⁹⁸

In regard to unemployment, continuing residency requirements can serve as a legislative solution to decrease local unemployment figures.¹⁹⁹ After the most recent fiscal crisis in 2008, some public administrators in towns throughout northern New Jersey began reconsidering the use of residency requirements that were on the books but apparently unenforced until recent times.²⁰⁰ In Hoboken, thirty city employees residing outside of the town were told to move back to the town or be fired as a response to the town facing a huge tax increase.²⁰¹ In Jersey City, the current status of the requirement suffers from massive non-compliance, with the municipal clerk estimating that 1,237 of the city's 2,940 public employees live outside of its limits.²⁰²

If Jersey City, or any other place similarly situated, undertook a

7 (noting that Fort Lee, Clifton, Harrison, Kearny, West Orange, Bayonne, and Millburn all faced challenges to their residency requirements from the NAACP and that the town of Fort Lee had dropped its rule as a response); Terry Pristin, *Judge Allows Residency Rule*, N.Y. TIMES, July 9, 1996, at 1 (highlighting that the challenge against the Bayonne residency requirement was unsuccessful).

¹⁹⁷ *Newark Branch, NAACP*, 904 F.2d at 795. At the time the case was decided, ninety-eight percent of the town of Harrison was white. See *Court Fight Doesn't Save Residency Requirement*, N.Y. TIMES, Mar. 24, 1998, at 6.

¹⁹⁸ See *Abrahams v. Civil Serv. Comm'n*, 319 A.2d 483, 497 (1974) (Pashman, J., dissenting) (describing the issue pertaining to who the city hires and not the issue of residency requirements).

¹⁹⁹ See S. S1730, 214th Conditional Veto (N.J. 2011).

²⁰⁰ See Ricardo Kaulessar, *Residency Requirements Cause Controversy*, HUDSONREPORTER.COM (Jan. 6, 2009), http://www.hudsonreporter.com/view/full_story/1211333/article-Residency-requirements-cause-controversy-Bayonne—other-towns-will-force-city-workers-to-live-here-.

²⁰¹ *Id.* Bayonne's town administrator apparently circulated an internal memo reminding all non-uniformed employees that they needed to comply with the residency requirement or face termination, and in West New York the town's mayor is considering instituting a comprehensive residency requirement that would require all newly hired employees to reside in the town. *Id.*

²⁰² *Id.* Recall that there is a statutory exemption for police and firefighters in New Jersey that would apply to a number of the non-complying Jersey City public employees. See N.J. STAT. ANN. § 40A:14-9.1 (West 2010); N.J. STAT. ANN. § 40A:14-122.1 (West 2010). Thus, theoretically a sizeable portion of those employees have statutory exemptions.

more strenuous enforcement of its residency requirement, the result would almost necessarily entail a reduction in unemployment. As employees are confronted with the difficult choice of abandoning their positions or changing their homes, a certain number of employees will refuse to relocate and thus be terminated for non-compliance with the requirement.²⁰³ Since the effect of a residency requirement is to restrict the flow of labor from outside sources by limiting employment opportunities to a jurisdiction's residents, some of a town's otherwise unemployed residents will receive a competitive, if not exclusive, advantage to obtain these employment positions. The detriment shifts to any and all otherwise eligible persons who are stifled from obtaining employment by the requirement.

The original bill proposed by Senator Norcross would have required all current employees of New Jersey to become residents of the state within two and a half years of enactment.²⁰⁴ This would have required eight percent (approximately 6,075) of the state's employees to either move to New Jersey or forfeit their jobs.²⁰⁵ Municipal and county workers throughout New Jersey residing outside of the state would have found themselves in the same forced situation.²⁰⁶ Fortunately for current employees, the New Jersey First Act, as approved, contains a grandfather clause for all current employees so long as they have no break in public service greater than seven days.²⁰⁷ Without the grandfather clause, the New Jersey First Act would have remedied unemployment by securing a certain number of positions that were previously held by New Jersey's neighbors from Delaware, Pennsylvania, and New York, but were lost because the affected workers were either unable or unwilling to relocate to New Jersey. As the bill currently stands, it will help to remedy future unemployment by permanently foreclosing public employment positions to all residents living outside of New Jersey unwilling to relocate there.²⁰⁸ The massive bridges spanning the natural boundaries created by the Hudson and Delaware Rivers

²⁰³ See Werner Z. Hirsch & Anthony M. Rufolo, *Economic Effects of Residence Laws on Municipal Police*, 17 J. URB. ECON. 335, 338 (1985).

²⁰⁴ See S. S1730, 214th Leg. (N.J. 2010).

²⁰⁵ *Jersey May Grandfather PA Residents*, THE MORNING CALL (Mar. 31, 2010), http://articles.mcall.com/2010-03-31/news/all-newjerseyresidency-03312010_1_residency-bill-new-jersey-senate-williams-townships.

²⁰⁶ See *id.*

²⁰⁷ See N.J. STAT. ANN. § 52:14-7 (West 2010).

²⁰⁸ *Id.* The one major exception will be for persons at institutions of higher education and those exempted by the five-member committee. *Id.*

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between New Jersey and its neighboring states signify a testament to our states' connectedness that ought to be reflected in our policies towards one another in both the public and private sector. As State Representative Steve Santarsiero of the thirty-first legislative district of Pennsylvania lamented, "We shouldn't be passing laws that set up barriers between states, either in the private or the public sector. . . . There are people out there working hard . . . and it shouldn't matter where they live."²⁰⁹ As commonsense as Santarsiero's statement is, it does little to change the benefit of insulating our own tax base and public employment positions by restricting the flow of outside labor.

3. Community Identity and Stake in the City

An amalgamation of the *Ector* factors suggests that residency requirements forge a beneficial community identity between public employees and the community-at-large, thereby causing these employees to work harder by way of their knowledge and commitment to the community.²¹⁰ In addition, this sense of community interest also purportedly results in a reduction of tardiness and absenteeism.²¹¹ An individual's subjective feeling of a greater affinity to a community is difficult to measure, if calculable at all. A recent qualitative study on the effect of residency requirements in providing community interest benefits revealed that officers disagreed that such benefits were obtained by imposition of residency requirements.²¹²

Whatever particular community benefits would accrue from a residency requirement, more objective measurements would provide insight into what is actually happening and affecting employees than mere speculation. Absenteeism and tardiness could be remedied through attendance policies that accrue benefits for complying employees and punish those failing to meet the requisites. Employees could be tested on any knowledge of the city that is relevant to the performance of duties.²¹³ The possibility of addressing

²⁰⁹ Santarsiero Pens Letter to N.J. Legislators Opposing Residency Requirements for State Employees, PENNSYLVANIA HOUSE DEMOCRATIC CAUCUS (Mar. 12, 2010), <http://www.pahouse.com/pr/031031210.asp>.

²¹⁰ *Ector v. City of Torrance*, 514 P.2d 433, 436 (Cal. 1973), *cert. denied*, 415 U.S. 935 (1974).

²¹¹ *Id.*

²¹² See Johnson, Warchol & Bumphus, *supra* note 61, at 55. These officers' responses are likely biased to the extent they would prefer not to be subject to the requirements.

²¹³ For example, if a fire department thinks that use of a residency requirement is

objectives of the community through means capable of objective measurement suggest that depriving the individual of his choice of where to live while retaining a position of employment on the basis of a community of interest theory may be an excess burden on liberty. Nevertheless, under a rational basis level of scrutiny, this elusive and ephemeral reason will continue to be accepted as it is difficult to either repudiate or substantiate.

4. Adequate Response to Emergency Situations

The most consistent reason proffered in *Ector* and other cases for enacting continuing residency requirements has been to ensure an adequate and prompt response time during emergency situations unique to a particular class of employees.²¹⁴ In *Detroit Police Officers Ass'n*, the Michigan Supreme Court highlighted the distinguishing characteristics of a police officer's duties and considered these differences to be dispositive in creating a rationally distinguishable class that could be subjected to discriminatory treatment by the legislature.²¹⁵ In *McCarthy*, the U.S. Supreme Court also resolved the constitutionality of a targeted residency requirement for firefighters in favor of the city of Philadelphia after a challenge by an employee who relocated to New Jersey.²¹⁶ Prior to the *McCarthy* decision, earlier court decisions from various jurisdictions had also concluded that police were distinguished from other classes of public employees upon rejecting the application of comprehensive residency requirements to public school teachers.²¹⁷

Although perhaps the most defensible basis for imposing residency requirements, the need to preserve a presence in a city or geographical area should only apply to those classes of employees with incumbent duties that require their presence during off-duty

important to ensure that all firefighters know the quickest ways around the town to ensure prompt response time while on duty, a test could easily be devised to ensure that the employee is aware of what route to take in a given emergency situation. Moreover, it could be problematic to presume that residency necessitates certain knowledge about the city that is pertinent to the position. The person might lack the expected and required knowledge irrespective of living within the purview of the requirement.

²¹⁴ See *Ector*, 514 P.2d at 436; see also *Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97, 97-98 (1971), *appeal dismissed*, 405 U.S. 950 (1972).

²¹⁵ See *Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97, 97-98 (Mich. 1971).

²¹⁶ *McCarthy v. Phila. Civil Serv. Comm'n*, 424 U.S. 645, 645 (1976) (per curiam).

²¹⁷ See *Hanson v. Unified Sch. Dist.*, 364 F. Supp. 330, 334 (D. Kan. 1974); *Donnelly v. City of Manchester*, 274 A.2d 789, 790-91 (N.H. 1971).

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hours. This rationale is particularly applicable to emergency response employees. In any event, the New Jersey First Act does not adopt this legislative reasoning since the scope of the requirement effectively bars those living outside of the state from obtaining any public employment position within the state.²¹⁸ In effect, the law would allow a firefighter in Cape May to live in Bergen County, despite disallowing a Hunterdon County firefighter the option of living in New Hope, Pennsylvania—a town directly across the Delaware River adjacent to Hunterdon County. This seems to suggest that the emergency response time rationale is only applicable to a geographically smaller residency requirement circumscribed to a county, city, or municipality.

The theoretical underpinnings of the application of the rationale have fewer implications for New Jersey firefighters and police as these employees already enjoy a statutory exemption from residency requirements that was obtained during the 1970s.²¹⁹ As firefighters and police are the archetypal emergency positions held by the publicly employed, the legislative purpose of enacting this statewide exemption from localized residency requirements is questionable. As a practical matter, it is arbitrary reasoning to require a publicly employed secretary to live in a town, when police and firefighters are exempted from the requirement despite having emergency employment duties that necessitate proximate residency to a geographic location. In Trenton, where eighty percent of the “rank-and-file” firefighters live outside the city, the department has had to rely more on volunteer support because some employees, living over forty-five minutes away, cannot respond in time.²²⁰ This calls into question the ends that residency requirements in New Jersey seek to promote and whether this utilization is problematic.²²¹

While the emergency response justification seems strongest in light of the fact that the U.S. Supreme Court’s decisions in *McCarthy* and *Detroit Police Officers Ass’n* dealt with targeted residency requirements for police and firefighters, New Jersey’s legislative exemptions have reduced the reasonableness of this justification for

²¹⁸ See S. S1730, 214th Leg. (N.J. 2010).

²¹⁹ See N.J. STAT. ANN. § 40A:14-9.1 (West 2010); N.J. STAT. ANN. § 40A:14-122.1 (West 2010).

²²⁰ Jay Romano, *Challenging Residency as Job Requirement*, N.Y. TIMES, Aug. 25, 1991, at 1. In Camden, New Jersey, approximately ninety percent of the rank and file firefighters live outside of the city. *Id.*

²²¹ See *infra* Part III.C.

enforcing residency requirements. Aside from the potential detriment to public safety that may occur when police and firefighters do not observe residency requirements, there also seems to be a fundamental unfairness to selectively exempt these classes of employees while imposing the requirement on other employees where justifications are more tenuous. Multiple jurisdictions and the U.S. Supreme Court have specifically identified police and firefighter as classes of employees with emergent employment duties that distinguish their position from other public workers. The commonsense of this logic is indubitable, and it ought to be reflected in the legislature's balancing.

5. Rational Basis Scrutiny of Residency Requirements

Although many of the legislative reasons underpinning the use of residency requirements can be called into question directly, the New Jersey judiciary has remained conscious of the legislative balancing and reticent to weigh in on any policy judgments regarding residency requirements.²²² Other jurisdictions have directly addressed residency requirements beyond their surface policy justifications, thereby mitigating some of the judicial deference under rational basis scrutiny historically accorded by the New Jersey Supreme Court.

In a case predating *McCarthy*, a teacher in Kansas challenged the applicability of a comprehensive residency requirement incumbent on all public employees of Wyandotte County to live within its geographic jurisdiction.²²³ Although the Court applied a compelling interest standard, it posited that the classification was "essentially arbitrary" and would have been invalidated even if subjected to a rational basis review.²²⁴ In *Lewis v. City of Kinston*, a police officer, upon being informed that he needed to move within the county or face termination, challenged the enforceability of a city ordinance requiring all city employees to reside in Lenoir County under the Equal Protection Clause.²²⁵ The North Carolina court acknowledged that *Ector* supplied the applicable rational basis level of scrutiny to review the ordinance, and summarized that the city's reasons for the requirement were to ensure that the individual would: (1) contribute to the city's tax base; (2) vote in city elections; (3) participate in the

²²² See *Abrahams v. Civil Serv. Comm'n*, 319 A.2d 483, 485 (N.J. 1974); *Kennedy v. City of Newark*, 148 A.2d 473, 475 (N.J. 1959).

²²³ See *Hanson v. Unified Sch. Dist.*, 364 F. Supp. 330, 330-31 (D. Kan. 1974).

²²⁴ *Id.* at 334.

²²⁵ *Lewis v. City of Kinston*, 488 S.E.2d 274, 275 (N.C. Ct. App. 1997).

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city's community; and (4) respond quickly in the event of an emergency situation.²²⁶ Although the court accepted that these were rational ends, it still found the ordinance unconstitutional under the Fourteenth Amendment of the Federal Constitution and also under the North Carolina State Constitution.²²⁷ Since the ordinance provided the plaintiff with an option of living not only within the city of Kinston but also in the surrounding Lenoir County, the court reasoned that there was no reasonable assurance that the residency requirement would further the aforementioned goals of the residency requirement.²²⁸ The court also rejected the emergency response time exception because the location of the city of Kinston and the shape of Lenoir County rendered parts of the county farther from the city of Kinston than other neighboring counties.²²⁹ In the eyes of the court, this constituted an arbitrary and irrational connection between the legislative means and proclaimed objective.²³⁰

The *Lewis* case serves as evidence that plaintiffs could potentially utilize the rational basis test to invalidate a residency requirement if there is not a sufficient nexus between the legislative objective and the use of a residency requirement to obtain that objective. The case is exceptional in that the court scrupulously examined the relations between the legislative ends and means, and it is questionable whether such a review would occur in New Jersey in light of the past jurisprudence of *Abrahams* and *Kennedy*. Nevertheless, *Lewis* illustrates that a challenge under a rational basis standard of review could be successful under certain circumstances.

In sum, challenges to continuing residency requirements under the Equal Protection Clause of the Federal Constitution are likely to falter in most circumstances. While the more recent *Lewis* case from North Carolina establishes the possibility of rational basis scrutiny invalidating a comprehensive residency requirement, the scrupulous

²²⁶ *Id.* at 276.

²²⁷ See N.C. CONST. art. I, § 19 (“No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.”); *Lewis*, 488 S.E.2d at 277.

²²⁸ *Lewis*, 488 S.E.2d at 277.

²²⁹ *Id.* Specifically, the requirement would not ensure plaintiff would vote in municipal elections, contribute to the city's tax base, or obtain an interest in the community. *Id.*

²³⁰ *Id.*

review by which the *Lewis* court applied rational basis scrutiny was atypical.²³¹ New Jersey, in particular, has exercised a continued deference towards implementation of continuing residency requirements since the earliest Equal Protection challenges were levied under the Federal or New Jersey Constitution.²³² Thus, any challenges to the New Jersey First Act employing an equal protection argument, whether under the State or Federal Constitution, will have an improbable chance at success in light of past New Jersey jurisprudence regarding residency requirements.

C. *Dormant Commerce Clause*

Article I of the Federal Constitution empowers Congress “to regulate commerce . . . amongst the several states.”²³³ Although not explicitly stated, the U.S. Supreme Court has interpreted a negative power into the Commerce Clause empowering the judiciary to invalidate laws that disproportionately burden interstate commerce.²³⁴ When applied to a state law in putative violation of the Dormant Commerce Clause, a court must first determine whether the ordinance or statute at issue discriminates against interstate commerce.²³⁵ Upon finding that the ordinance or statute at issue burdens interstate commerce, a court must then proceed to determine whether the burden is “clearly excessive” when weighed against the “putative local benefits.”²³⁶ Thus, the first step for establishing a cognizable Dormant Commerce Clause claim requires showing that the public employment positions foreclosed to non-residents by a given residency requirement are subjects of interstate commerce burdened by the restriction on the flow of labor.

The public employment relationship is similar to the employment relationship in the private sector in the sense that the employee proffers his time and energy in return for some form of compensation. At some basic level, the employee contracts to sell his labor to an employer, who is coincidentally the government in the context of public employment. In New Jersey, the government’s total

²³¹ See discussion *supra* Part III.B.

²³² See discussion *supra* Part III.B.

²³³ U.S. CONST. art. I, § 8.

²³⁴ See, e.g., *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 579 (1997) (invalidating a tax scheme that disproportionately disadvantaged out-of-staters in favor of the interests of local residents).

²³⁵ *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

²³⁶ *Id.*

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salary expenditure for public employees throughout the entire state for the month of March 2009 approximated \$2.6 billion, a substantial expenditure of revenue.²³⁷ The sheer magnitude of New Jersey's total state expenditure on public employment alone, nearly \$30 billion annually, affects interstate commerce.²³⁸ The restriction on the flow of labor accomplished by any statewide residency requirement arguably puts a burden on interstate commerce by preventing an otherwise capable labor force from a neighboring state from entering the labor market. It is specifically this flow of labor between states that the New Jersey First Act targets. The negative economic impact on the neighboring state would perhaps constitute a burden on interstate commerce sufficient to implicate a Dormant Commerce Clause analysis.

Proceeding under the assumption that the public employment positions foreclosed by the New Jersey First Act constitute "commerce" under the Commerce Clause, a plaintiff challenging a statute carries the initial burden of showing discrimination against the commerce of another state.²³⁹ Statutes that are discriminatory on their face against the economic interests of out-of-state residents have been deemed invalid unless there was no alternative means to advance the local interest.²⁴⁰ Where a state regulates even-handedly and only incidentally favors local economic interests, the statute will be "upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."²⁴¹ In *Pike v. Bruce Church*, the U.S. Supreme Court further provided that a balancing approach considering the burden on interstate commerce weighed against the putative local benefit, while taking into consideration other plausible means of achieving the legislative end, should be the approach taken to resolve the tension.²⁴²

With regard to the New Jersey First Act, the legislative ends sought debatably stem from protectionist economic motivations. The

²³⁷ U.S. CENSUS BUREAU, *2009 Annual Survey of Public Employment and Payroll of New Jersey*, <http://www2.census.gov/govs/apes/09stlnj.txt> (last updated Jan. 2012).

²³⁸ *See id.*

²³⁹ *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

²⁴⁰ *See City of Phila. v. New Jersey*, 437 U.S. 617, 628 (1978). An ordinance that discriminates against out-of-state residents exclusively as a local economic protectionist measure will be not be sustained despite discriminating against some in-state and out-of-state residents. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951).

²⁴¹ *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

²⁴² *Id.*

bill's sponsor, Senator Norcross, advanced the bill as a piece of long-overdue legislation capable of providing a significant source of revenue during the tough economic times witnessed since 2008.²⁴³ Its protectionist nature sparked concern from Pennsylvania State Representative Steve Santarsiero, who urged for the incorporation of the grandfather clause that was eventually added to the Senate Committee substitute and subsequently adopted in the final bill.²⁴⁴ Other Pennsylvania legislators also threatened to introduce an identical residency bill as a response to the New Jersey First Act when it was still pending legislation.²⁴⁵ These threats of retaliatory measures embody a fear of feuding between and among the states leading to the creation of protectionist laws. As the U.S. Supreme Court asserted in *Baldwin v. G.A.F. Seelig Inc.*, "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."²⁴⁶

In some respects, a challenge to a continuing residency requirement under the Dormant Commerce Clause is stronger if the requirement is statewide as opposed to a more localized residency requirement limited to a county or city. For example, the New Jersey First Act, as enacted, forecloses all future opportunities to obtain public employment positions to persons residing outside of New Jersey.²⁴⁷ Whereas a localized residency requirement only affects a smaller pool of outside residents, the larger the scope of the requirement, the greater the restriction on the flow of labor and resulting burden on interstate commerce. In this sense, the New Jersey First Act and similar residency requirements embody a form of economic protectionism more likely to be invalidated by judicial review under the functioning of the Dormant Commerce Clause than those circumscribed to smaller geographical localities.

A Dormant Commerce Clause challenge to the New Jersey First

²⁴³ See Senator Norcross Proposes State Residency Law, *supra* note 172.

²⁴⁴ Jersey May Grandfather PA Residents, *supra* note 205.

²⁴⁵ *Id.* Pennsylvanian State Senator Lisa Boscola did propose an identical bill but only as part of a protest to the requirements and not as part of a serious agenda to institute the requirement. See Lisa Boscola Introduces Pa. Residency Bill to Get N.J. Legislators' Attention, EXPRESS-TIMES, June 24, 2010, http://www.lehighvalleylive.com/today/index.ssf/2010/06/lisa_boscola_introduces_pa_res.html.

²⁴⁶ 294 U.S. 511, 523 (1935).

²⁴⁷ See S. S1730, 214th Leg. (N.J. 2010).

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Act or a similar comprehensive residency requirement could potentially provide a more favorable standard of review than could be obtained under rational basis scrutiny. Specifically, when using this review, a court would balance the legislative rationales for residency requirements, as summarized in *Ector*, against the burden on interstate commerce. This would invite a greater level of scrutiny than that offered by rational basis review, especially in light of the tremendous deference it accords to continuing residency requirements. A Dormant Commerce Clause analysis would bring any statewide comprehensive residency requirement, such as the New Jersey First Act, into proper economic focus. Thus, a challenge under the Dormant Commerce Clause, if accepted, could provide an elevated level of constitutional scrutiny as compared to the standards afforded under Equal Protection and Privileges and Immunities challenges.

IV. CONCLUSION

In New Jersey, the judiciary has long regarded residency requirements as a constitutional exercise of legislative power rationally related to promoting an acceptable end.²⁴⁸ The New Jersey First Act, despite its benefits to New Jersey residents, would fashion a protectionist measure against our neighboring states. The exclusion of our neighbors from public employment opportunities could also provoke retaliatory legislation that would be to the detriment of many New Jersey residents.²⁴⁹

The cost of imposing a residency requirement comes in the form of a loss of liberty that falls primarily on the individuals forced to quit their positions or relocate. Even with the use of a grandfather clause, such as was incorporated in the final version of the New Jersey First Act, the loss of liberty still affects all future out-of-state residents as their ability to find public employment positions is inevitably constrained to a more limited market. Residency requirements may also have the effect of filtering applicants from positions solely based on their place of domicile, threatening to create local political oligarchies. In short, a merit-based system aimed at creating the most capable public workforce ought to be the objective of hiring practices

²⁴⁸ See discussion *supra* Part II.B.1.

²⁴⁹ See *Lisa Boscola Introduces Pa. Residency Bill to Get N.J Legislators' Attention*, *supra* note 245. A bill like the one proposed by Senator Lisa Boscola of Pennsylvania is inherently more problematic and would injure any New Jersey resident seeking public employment in Pennsylvania. See *id.*

for any municipality or government. Although these ends may be sought tangentially through the use of residency requirements, the causal nexus between these ends and means is lacking.

Limited legal remedies remain available for challenging residency requirements. The *McCarthy* case has virtually foreclosed the possibility of the success of any fundamental right to travel challenges to residency requirements under the Federal Privileges and Immunities Clause. This remains especially pronounced in light of the fact that the New Jersey Supreme Court is unlikely to overrule its earlier decision in *Kennedy* or follow the precedent of *Donnelly*. Given the substantial deference the New Jersey Supreme Court enunciated in *Kennedy*, it is also unlikely that arguments under the New Jersey State Constitution calling for a fundamental right of travel, applicable to continuing residency requirements, would succeed. While this avenue of challenging the New Jersey First Act is plausible under the State Constitution, its chances of success are improbable.

Detroit Police Officers Ass'n further established that rational basis scrutiny would be the constitutional standard of review for challenges to continuing residency requirements under the Equal Protection Clause. Challenges under the Fourteenth Amendment have a plausible chance of succeeding on certain factual circumstances, but this cannot be assured given the tremendous presumption of deference accorded to the legislature.

Finally, a plausible argument could be made that continuing residency requirements violate the Federal Constitution under a Dormant Commerce Clause analysis. This argument has never been directly levied at a comprehensive residency requirement and the feasibility of the claim remains questionable. In particular, it hinges on an assumption that statewide employment restrictions affect and burden interstate commerce. Assuming the burden exists, this argument offers the potential of a balancing approach that would perhaps be more favorable than the rational basis scrutiny proffered under the Equal Protection Clause.

Even in the absence of judicial relief, a question remains as to whether the New Jersey First Act is the proper political solution. While the New Jersey legislature has contrived of a manner to exclude out-of-state residents from a large sector of New Jersey's labor market, other states have completely eradicated the residency

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requirement by way of state statute.²⁵⁰ If the motive of the New Jersey First Act and other residency requirements is merely to insulate the local tax base or bolster employment through geographic favoritism, we ought to abhor these measures and seek alternatives that do not impinge on the free movement of labor and liberty interests of the individual. The irony rendering this conclusion mostly unlikely, however, can be grasped by common sense. Simply put, restricting public employment positions to a single state's residents has the dual advantage of increasing the number of local jobs, a concern of constituents, and increasing tax collection, a prime concern of legislatures. The constituency populations most affected by these laws, moreover, reside in neighboring states and cannot help themselves by voting out the politicians that have deprived them of public employment. With a dual benefit to be obtained and no cognizable detriment to the political popularity of the enacting legislators, it is of little surprise that the New Jersey First Act was passed.

As time passes and more New Jersey residents inure benefits from the New Jersey First Act by obtaining public employment positions to the exclusion of otherwise eligible out-of-state residents, one can portend that a political inertia favoring the Act will develop. This inertia will render it dubious that the individual liberty lost, whether considered constitutionally protected or not, will ever be restored.

²⁵⁰ See, e.g., R.I. GEN. LAWS § 45-2-15.1 (exempting police officers and firefighters); R.I. GEN. LAWS § 45-2-15.2 (exempting municipal employees); see also R.I. GEN. LAWS § 16-12-9 (exempting public school teachers and administrators); *City of Lima v. State*, 909 N.E.2d 616, 621 (Ohio 2009) (upholding legislative ban on all residency requirements throughout the state of Ohio).